STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2004B088**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LARRY BARRON,

Complainant,

vs.

DEPARTMENT OF LABOR AND EMPLOYMENT, OFFICE OF FIELD OPERATIONS,

Respondent.

THIS MATTER came on for hearing on March 9 and April 12, 2004, in the offices of the State Personnel Board before Administrative Law Judge Mary S. McClatchey. Complainant appeared through counsel, Todd J. Hall. Respondent appeared through Andrew Katarikawe, Assistant Attorney General. The record remained open until April 23, 2004 for submission of written closing arguments.

MATTER APPEALED

Complainant, Larry Barron ("Complainant" or "Barron") appeals his termination from employment by Respondent, Department of Labor and Employment, Office of Field Operations, ("DOLE" or "Respondent"). Complainant seeks reinstatement, back pay, and an award of attorney fees and costs.

For the reasons set forth below, Respondent's action is **rescinded.**

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;

2. Whether Respondent's disciplinary action against Complainant was arbitrary, capricious or contrary to rule or law;

3. Whether Respondent engaged in disability discrimination under the Colorado Anti-Discrimination Act;

4. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

General Background; Performance Decline

1. Complainant commenced employment at DOLE in 1993. By 1999, he had become a Labor and Employment Specialist II ("L & E II") in the Workforce Development Program.

2. Barron was historically an excellent employee, well liked by those with whom he worked. In 1997, 1998, and 1999, he was rated "Exceeded Expectations" on his performance evaluation, the highest rating possible.

3. In 2000, Barron went through a divorce, which caused him to develop clinical depression. He started seeing a therapist at the Veterans Administration hospital. Barron's depression caused him to have difficulty sleeping, focusing at work, and to feel hopelessness about the future. He found it increasingly difficult to multi-task.

4. Barron's performance of the veteran's outreach portion of his duties began to slide gradually downhill. In 2002, he received a performance rating of 179.60 points, Needs Improvement.

5. In August 2002, Milton Gonzales, the federal Department of Labor Veterans Employment and Training Service investigator, conducted his annual performance review of the Montrose region. In his review, he cited two areas of concern that were directly related to Barron's failure to perform up to federal standards.

September 2002 Corrective Action

6. On September 18, 2002, Barron's second level supervisor, Tom Looft, the Denver-based Director of Workforce Development Programs, issued Barron a corrective action based on that federal audit. The corrective action cited Barron for having "very limited contact with the local employer community," not performing "any in person contacts this year," and failing to provide "any Case Management file folders for review." The letter also noted that the Western Sub-region had been placed under "Program Improvement Plans" based on noncompliance with federal regulations for the years 2000, 2001, and 2002, and that as the veteran's representative for the region, Barron was responsible for ensuring the program operated effectively and in compliance with federal regulations.

7. Looft listed seven specific areas of performance that in which Barron was required to improve, including employer relations activity; case management; submission of quarterly reports; oversight of the veterans program to assure service is provided; and submission of a corrective action plan to the federal veterans' oversight office.

8. The letter warned Barron that failure to adhere to the corrective action could result in disciplinary action up to termination. The corrective action advised Barron of his right to attach a written statement to the corrective action.

9. Following receipt of the corrective action, Barron sent an email to Looft indicating he sought to add a written statement that he was depressed. For unknown reasons, this did not occur.

10. Barron did not grieve the corrective action.

August 2003 Demotion

11. Barron's performance dropped again in early 2003.

12. On April 10, 2003, the federal Veteran's Employment and Training Service reviewed the Montrose office again. It cited Barron for continued noncompliance with federal regulations, providing little or no technical assistance and training to staff, and placing only one veteran into case management from December 17, 2002 to April 10, 2003. Barron was also cited for having made statements to the reviewers during the meeting that he did not know what to do with a veteran in case management, that he did not wish to be the veteran's representative in his office, and that he should have been terminated from the veterans' representative position the previous year.

13. Barron's duties as veteran's representative constituted 50% of his Labor and Employment II position at DOLE.

14. On May 9, 2003, upon receipt of this federal review, Tom Looft sent a detailed letter requesting disciplinary action against Barron to Joyce Johnson, Director of Field Operations, DOLE.

15. Johnson sent a letter to Barron noticing a pre-disciplinary meeting pursuant to State Personnel Board Rule R-6-10.

16. At the June 25, 2003 pre-disciplinary meeting, Johnson reviewed all of the allegations against Barron with respect to his sub-standard performance. She reviewed the September 2002 corrective action terms, and the specific ways Barron was failing to perform in his position. She then asked Barron to respond.

17. Johnson was familiar with Board Rule R-6-10 and made every effort to comply with it at the June 25, 2003 meeting.

18. During this pre-disciplinary meeting, Barron stated to Johnson,

> "About October, I sought treatment for depression at the V.A. Hospital, and I'm currently being treated for depression at the V.A. hospital, and it has been up and down ever since I sought treatment. The depression is clinical depression, and they don't know how long it's been going on. What else can I say? It goes up and down as far as the depression goes. One of the problems I have with the

depression is I have an inability to concentrate for long periods of time. If I'm interrupted, I do not recall what I was doing before I was interrupted. So, I – do you have a question?"

19. Johnson then stated to Barron, "I'm not sure that it's really appropriate for you to go into the details of that at this point in time . . . And since it's personal medical history, so if you would move on, please?"

20. On August 8, 2003, Johnson demoted Barron to Labor and Employment Specialist I. In her lengthy letter, she cited the following reasons for the demotion:

    i. Violation of the terms of the September 18, 2002 Corrective Action. Specifically, failure to perform employer relations activity on behalf of veterans, failure to maintain a list of employer contacts, individual job development contacts and job orders; failure to enroll veterans in case management or maintain records of such; failure to submit LVER Technical Quarterly Reports in a timely manner and to use the report to identify program issues in need of improvement; failure to provide functional supervision of the Veteran's program in the Western Sub-region, such as reviewing veteran applications for service and referral, ensuring veterans receive preference on job orders, and failing to provide staff with training and information on the Veteran's program; failure to sustain satisfactory performance after the 60-day review following submission of performance improvement plans to the federal government;

    ii. Failing to perform at a standard level at the time of the 2003 federal Veterans' Employment Programs Review, as reflected in the 4-25-03 review;

    iii. A pattern of declining performance as evidenced by his evaluation scores of 272.85 in 1999, 260 in 2000, 222 in 2001, and 179 in 2002;

    iv. Contrary to his comments at the R-6-10 meeting, he had not performed actual supervisory duties with line staff in the past [Johnson later learned that he had in fact performed supervisory duties; see Finding of Fact #35];

    v. Failure to share information with staff in his role as the Veteran Representative;

    vi. Several complaints had come to his direct supervisor, Ray Lucero, concerning poor customer service. He had repeatedly failed to return calls to employers, after having been directed to do so by Lucero. Further, he had inappropriately threatened a clerk in another office with a federal audit because the County had pulled an advertised job, causing the clerk to become so upset she cried;

    vii. Failing to spend half of each day performing LVER duties, as directed by Lucero;

viii. During the meeting with federal reviewers in 2003, he had stated he was not doing the LVER job, did not want the job, and "should have been fired the previous year."

21. Barron did not appeal his demotion.

22. On August 13, 2003, Johnson held a second meeting with Barron to further discuss and explain all of the information she had considered in deciding to demote Barron. At the end of this meeting, she informed Barron she would be having a follow-up meeting of a pre-disciplinary nature in late September to assess his performance.

Barron's Performance in the Labor and Employment Specialist I Position

23. Following Barron's August 8, 2003 demotion to L & E I, Respondent did not provide Barron with a new performance plan. No evidence suggests that Respondent discussed Barron's new level of job responsibilities in the L & E I position with him.

24. Respondent did not conduct an evaluation of Barron's performance in the L & E I position following his August 2003 demotion.

September 30, 2003 Pre-disciplinary Meeting

25. In September 2003, one month after demoting Barron, Johnson sent him a notice of another pre-disciplinary meeting. This letter is not in evidence.

26. On September 30, 2003, Johnson, Barron, and Ray Lucero, Barron's direct supervisor, attended the pre-disciplinary meeting, which was tape recorded. At the outset of the meeting, Johnson stated, "today what I want to do is to reconvene so that we can look over your performance now and talk in general how things are going, and raise any other issues that have either been brought to me, or Ray Lucero as your direct supervisor has to visit about, and then any information that you have that you wish to share."

27. At no time during this meeting did Johnson present information about reasons for potential discipline to be taken against Barron at a future time, disclose the source of that information, or ask Barron to respond.

28. At the meeting, Johnson stated that the only new information she was bringing to the table was a clarification that his last performance review score was 176, representing the combined and averaged scores of Lucero and Heath. This Needs Improvement score had formed part of the basis for his demotion in August. Johnson then turned the meeting over to Lucero for the purpose of addressing any ongoing general performance issues.

29. Lucero stated the following: he recognized the past confusion regarding whether or not case management had been required; stated that case management was required; recognized Barron for having four active case management files at that time; and noted receipt of two

late quarterly reports, on September 16, 2003, from Barron. Barron's failure to submit those reports on time had formed one of the bases for his demotion.

30. Lucero and Barron reviewed the work Barron was doing on the case management files. Lucero noted that Barron was not entering all required information into JobLink.

31. Lucero discussed his need for better communication from Barron on any problems in the office and on staff's need for training. He stated, "I look to him [Barron] as being the expert, or the lead for our staff and also for me, because I'm not able to, you know, be aware of everything that comes down the pike . . . ."

32. Barron stated with regard to training that because of their staffing situation, "I cannot sit down and train staff as a group, because we can't close the office. It would have to be one-on-one. It's usually as needed. If I see a problem, then I call them. I go and talk to them about it, or they call me if they have a question. I mean, it's one-on-one. It's not really anything formal . . . So, I'm available there for technical assistance and for training."

33. Lucero then asked why, after he identifies a problem, Barron does not come to him. Barron stated that Lucero had enough on his plate as the Director, and unless it's something really major, there is no reason for him to do so.

34. Johnson then interjected that she understood Lucero had ordered Barron to report this type of low-level problem to him. Lucero clarified that if Barron helps an employee correct a performance issue, but the employee does not improve in that area, he should come to Lucero so that they can work together to find a solution to the problem.

35. The three then discussed the fact that Barron routinely receives conflicting directives from different supervisors in the agency, which Lucero doesn't learn of until well after the fact. Barron pointed out that agency representatives "change JobLinks every week," and send him conflicting email directives, often weekly.

36. Barron informed Lucero and Johnson that a written procedures manual would address this problem of conflicting directives.

37. No other performance issues were addressed at this September 30, 2003 meeting.

38. Johnson and Lucero spent a significant amount of time in the meeting discussing Lucero's management style.

39. Towards the end of the meeting, Johnson turned to Barron and asked if he had anything else to address. He then stated that he had a letter from the Veterans Administration to present to Johnson. Barron stated, "it talks about my treatment for depression, and as a result of that depression, an inability to focus . . . It does affect my performance, and has affected my performance. Ray was aware of it. My previous supervisor, B.J., was aware of it, so was the

Director. I have a hard time focusing, and if I am stressed or overwhelmed or interrupted when I'm trying to do something, then I can put something down, and when I turn away from it, it's gone. To me, it's finished, and unless something reminds me of it later, I may not be able to get back to it . . . Things are getting better. It depends on the stress level, and those go up and down. When those [quarterly] reports were due, I was going through – the first one was the federal review on April 10th? So the report was due right about that time . . . ."

40. The letter tendered to Johnson at this meeting was from Barron's therapist, Gerald Mitchell, LCSW [Licensed Clinical Social Worker], and it stated that since 2000, he had been treating Barron for profound depression, which has had a "negative impact on all aspects of his life" and causes him to have "real problems focusing." He stated that Barron was not "able to function at the same levels prior to the divorce, and was "in need of some support from those he works with."

41. Johnson and Lucero did not respond to this information concerning Barron's depressive condition, either by asking questions or by clarifying anything he or his therapist had reported.

42. Barron next asked Johnson if she had located records confirming his statement at the pre-disciplinary meeting preceding his demotion that he had supervised other employees. She confirmed that she indeed had located documents confirming this.

September 26, 2003 Incident

43. After the September 30, 2003 meeting, Johnson was informed of an incident on September 26, 2003 involving Barron and a former employee of the office, Mark Hawley.

44. On September 26, 2003, Hawley came to the Montrose office at 8:30 a.m. and visited Barron at his desk. Hawley informed Barron he was attempting to collect money owed to one of his clients by "SJP."1 Hawley told Barron that he sought a printout of the employer record for the company, so that he could have its location for collection purposes.

45. The material Hawley sought constitutes confidential data, not subject to disclosure to third parties by DOLE.

46. Barron informed Hawley that he could not release printed material to Hawley.

47. Hawley then got up and went behind Barron's desk. Barron had the SJP company record on his computer screen. Hawley took some notes off the computer screen, then left.

48. Barron was so surprised by Hawley's conduct that he did not know how to respond.

1 The name of this company will not be released in order to ensure confidentiality.

49. Barron failed to intervene and stop Hawley from leaving the agency with the confidential information.

50. Barron violated the confidentiality of SJP in allowing this disclosure to occur.

51. An employee who witnessed this incident informed Lucero about it.

52. Lucero interviewed the employee witness. Lucero did not interview Barron. Lucero informed Johnson about the incident.

53. No one interviewed Barron in the course of investigating what occurred on September 26, 2003.

54. Johnson never obtained Barron's version of the events of September 26, 2003 prior to deciding to impose discipline based on those events.

Termination Meeting of November 14, 2003

55. On November 5, 2003, Johnson sent Barron a notice of a "follow-up" R-6-10 meeting. The stated purpose of the meeting was "so that we can discuss your current employment status . . . as I indicated to you when we met earlier in September, I would reconvene our meeting after I had time to reflect on your current employment status following your demotion to a Labor and Employment Specialist I and any other concerns that led to this disciplinary action. The demotion in your position with the Rural Consortium's Western Sub-region Workforce Development System followed your failure to comply with a Corrective Action given you on September 18, 2002, and because of other performance problems raised since that corrective action."

56. This notice of pre-disciplinary meeting does not mention the September 26, 2003 incident. It contains no reference to job performance problems that might lead to further disciplinary action.

57. Johnson drafted a six-page, single-spaced termination letter prior to the November 14, 2003 meeting. She brought the termination letter and Barron's last paycheck to the meeting with her.

58. Barron attended the November 14, 2003 meeting with Johnson and Lucero.

59. Johnson started the meeting by providing Barron with some of the transcripts of prior pre-disciplinary meetings he had requested. She then terminated his employment, handing him the termination letter, stating,

> "Okay. You recall, Larry, your meeting of September 30th, I told you that we would be

coming back together after I had had a chance to review some of the material, and whatever else there was in order to look at where we were in terms of your employment. And, so, today, I have a number of things that I want to share with you. Here is the document [the termination letter]. I'm giving Larry a copy of the document also, and I have a copy. And, what I'm going to do is to read this into the record. I want to let you know that I have decided to terminate you, Larry."

60. She then advised Barron that she would review the reasons for the termination, but that they are "essentially the information I included at the point in time when we met earlier."

61. At no time did Johnson state that the purpose of the meeting was to present information about the reason for potential discipline, disclose the source of her information, or provide Barron with the opportunity to respond. Johnson did not state that the purpose of the meeting was to exchange information.

62. Johnson did not provide Barron any opportunity to provide mitigating information at the November 14, 2003 meeting.

63. During the meeting, Johnson did not reference the letter from Barron's therapist or Barron's statements about depression affecting his performance.

64. Johnson did not consider any mitigating information in making her decision to terminate Barron. She did not consider Barron's statement at the September 30 meeting that his depression "does affect my performance, and has affected my performance."

65. After reviewing the lengthy termination letter, Johnson closed the meeting by reading Barron his appeal rights in detail, directly from the letter. She then says, "Do you have any questions about this?" Barron replies, "No." She then says, "All right. Remove your badge. Do you have office keys?" He responds that he does, and she says, "Okay. We'd like to have those. And I have your check with me."

Termination letter

66. Johnson's termination letter states in part,

"I am terminating you from your Labor and Employment Specialist I (LES) position because of the following determinations:

1. You continue to perform your LES I duties at a sub-standard rate;
2. Your last two overall performance ratings were sub-standard;
3. You did not meet the requirements of a Corrective Action dated September 18, 2002;
4. You have put the federal funding of the Veterans' Employment and Training Program in your region in jeopardy through three years of sub-standard reviews;
5. You also admitted that despite Mr. Lucero's requests that you were to bring problems

to him and update him on program status, you had consciously made your own decision not to do as he had asked;

6. You violated several policies you not only had been reminded to uphold, but also were expected as the region's security officer to uphold; and
7. You shared computer information on an employer with a former employee so that he could use it in a collection dispute, which is not only clearly not your role but also an inappropriate use of your computer."

67. Regarding "determination" 1, Barron did not perform his LES I duties at a sub-standard rate. Respondent demoted Barron to this new position on August 8, 2003, but failed to demonstrate what, if any, new standards Respondent utilized to evaluate Barron's performance in his new position. Respondent failed to evaluate Barron in his new position.

68. With respect to "determinations" 2, 3, and 4, these three criteria formed the basis for Barron's demotion. No evidence supports the contention that Barron committed any of these three performance infractions during the period following his August 8, 2003 demotion.

69. Specifically, regarding Barron's "last two overall performance ratings" that were sub-standard, the demotion had been premised on those exact same ratings. Regarding Barron's role in placing the federal funding of the Veterans' Employment and Training Program in jeopardy through three years of sub-standard reviews, this history formed the basis for his demotion. Barron did nothing in the period following his August 2003 demotion to place federal funding of the veteran's program at risk.

70. Barron met the terms of the September 2002 Corrective Action in the period following his August 2003 demotion.

71. Johnson's "determination" number 5, that Barron had "admitted" in the September 30 meeting that he had "consciously made" his own decision not to do as Lucero had asked, is inaccurate. The transcript of the September 30, 2003 meeting2 illustrates that Barron provided a detailed explanation on this issue. He explained, "if there's minor problems [sic], or something like that, I don't see that as something that needs to be brought to your attention. If it's a major problem, then yes, I would definitely be banging on your door. But, I'm not going to be banging on your door for just, you know, Penny didn't do this or that, or Penny didn't do that, or something like that. For the most part, it's just a learning curve for them." In addition, after Lucero raised the problem of Barron having told other employees not to enter information into the computer, Barron responded by explaining that he had received conflicting directives from so many different people that without a written procedures manual, it was difficult for him to separate what he needs to "run by" Lucero as being correct, and what he should rely on. He stated, "if they don't come out with a set procedures manual, that they – and does not change via e-mail on a weekly basis, I don't see how that's going to work, because they change JobLinks every week."

2 Johnson testified that this was an accurate transcript of the meeting.

72. Barron's explanation above does not constitute an admission that he consciously made his own decision not to follow Lucero's directives.

73. With one exception, Johnson terminated Barron for the exact same conduct upon which she based his demotion three months previously. The only exception is the September 26, 2003 incident.

74. Regarding Johnson's "determinations" 6 and 7, concerning the September 26 incident, as stated above, Johnson never sought or obtained Barron's perspective on that event prior to terminating him. She never informed Barron she intended to impose discipline based on this incident, never gave Barron the source of that information, and never provided Barron the opportunity to explain what had occurred or to present mitigating information.

DISCUSSION

I. BURDEN OF PROOF

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-125, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801 and generally includes:

(1) failure to comply with standards of efficient service or competence;
(2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
(3) willful failure or inability to perform duties assigned; and
(4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, *supra*. The Board may reverse the agency's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, it must be determined whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

II. COMPLAINANT DID NOT COMMIT MOST OF THE ACTS FOR WHICH HE WAS TERMINATED

Respondent has failed to meet its burden of proving that Barron committed the acts upon which his termination was based. The bulk of evidence Respondent presented at hearing formed the basis for Barron's demotion; however, Barron did not appeal his demotion.

The question before the Board herein is whether Respondent has proven that after Barron's demotion on August 8, 2003, he engaged in acts constituting just cause for termination. Respondent provided scant evidence on this question. First, Respondent failed to prove that Barron performed his LES I duties at a sub-standard rate. In fact, no evidence in the record illuminates what, if any, standards Respondent utilized to assess Barron's performance following his demotion. No performance plan is in evidence. No interim evaluation is in evidence. No specific information on how Barron failed to comply with standards of efficient service or competence in the L & E I position is in evidence.

Turning to the other criteria upon which Respondent based Barron's termination, Respondent cited Barron's violation of the September 2002 Corrective Action in his termination letter. Again, Respondent failed to prove how Barron did so at hearing. No evidence demonstrates that Barron violated the terms of the corrective action during the period August 8 through November 14, 2003, the date of termination. To the contrary, the substantial evidence in the record demonstrates that Barron had four active case management files in mid-September, that he had caught up on the submission of quarterly reports in mid-September, and that he actively sought solutions to office management issues with Lucero and Johnson at the September 14 meeting.

The remaining criteria utilized to terminate Barron are invalid, as they formed the basis for his demotion three months previously (with the exception of the September 26 incident). Board Rule R-6-5 prohibits agencies from disciplining employees for the same conduct twice, unless the employee engages in additional acts of the same nature. Respondent has failed to prove that Barron engaged in additional acts of the same nature as those cited in the demotion letter.

The September 26, 2003 incident occurred after the August 2003 demotion, and therefore would, under normal circumstances, form a proper basis for considering corrective or disciplinary action. While this incident was cause for Johnson to schedule a pre-disciplinary meeting, she never held such a meeting. Instead, she terminated Barron in violation of R-6-10, as discussed below, thereby rendering any discipline based on this incident invalid as a matter of law.

In summary, Respondent has failed to meet its burden of proving that just cause existed for his termination. Therefore, the termination cannot stand. Colo. Const. Art. 12, § 13(8); § 24-50-125, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

III. RESPONDENT'S ACTION WAS ARBITRARY, CAPRICIOUS, AND CONTRARY TO RULE OR LAW

A. Respondent violated Board Rule R-6-10

When a state agency promulgates rules governing the discharge of its employees which are more stringent in favor of the employee than due process would require, the agency must strictly comply with those rules. *Dept of Health v. Donahue*, 690 P.2d 243 (Colo. 1984); *Shumate v. State Personnel Board*, 528 P.2d 404 (Colo.App. 1974).

Where the procedures for the dismissal of a civil service employee are not strictly followed, the dismissal is invalid and the employee must be reinstated. *Shumate,* 528 P.2d at 407.

State Personnel Board Rule R-6-10, 4 CCR 801, mandates,

> "When considering discipline, the appointing authority **must** meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision . . . ." (Emphasis added.)

Johnson violated Board Rule R-6-10 in the following ways:

- she failed to meet with Barron to present information about the reason for potential discipline and disclose the source of that information;
- she failed to give Barron any opportunity to respond to the information regarding the reason for his termination;
- she failed to exchange information with Barron concerning the reasons for terminating him.

Johnson's violation of Rule R-6-10 renders the termination invalid and Barron must be reinstated. *Shumate*, 528 P.2d at 407.

In *Shumate*, the appointing authority handed the employee a termination letter at the outset of a meeting, asked the employee to read it, and then asked the employee if he had anything to say about the matters contained in the letter. The employee responded, "I haven't done anything wrong." When the employee refused to resign, the appointing authority then stated, "This will serve as notice of your dismissal, effective immediately." *Shumate*, 528 P.2d at 406. The State Personnel Board rule at issue in *Shumate* was equivalent to Rule R-6-10: it required a pre-disciplinary "meeting" between a representative of the agency and the employee to discuss the alleged violations, "so that disciplinary action may be forestalled." *Id*. at 407. The *Shumate* court noted that "the immediate termination of Shumate's employment . . . was inevitable. Any attempts by Shumate to refute the information or present mitigating evidence at that point would have been an exercise in

futility. Thus, the agency, by its action . . . , violated both the spirit and the letter of [the rule]." *Id*.

The same is true herein. The immediate termination of Barron's employment was inevitable; Johnson had drafted the termination letter and cut his last paycheck prior to the time Barron walked into the room for the meeting on November 14, 2003. Johnson opened by meeting by informing Barron she had decided to terminate him. She never asked Barron to respond to the contents of the letter, or to discuss what had occurred on September 26, 2003. There was no exigency necessitating this method of termination.

The *Shumate* court held that the pre-disciplinary meeting "must afford the employee a reasonable chance of succeeding if he chooses to avail himself of the opportunity to defend himself," and that "[w]here the procedures for dismissal of a civil service employee are not strictly followed, the dismissal is invalid and the employee must be reinstated." *Shumate*, 528 P.2d at 407. Under the circumstances presented here, which are far more egregious than those in *Shumate*, the termination is invalid and Barron must be reinstated as a Labor and Employment Specialist I. *Shumate*.

B. Respondent violated Board Rule R-6-6

State Personnel Board Rule R-6-6 states in part,

> **"The decision to take corrective or disciplinary action shall be based on** the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, **and mitigating circumstances. Information presented by the employee must also be considered."** (Emphasis added.)

Johnson failed to consider any mitigation prior to terminating Barron, in violation of Board Rule R-6-6. First, as noted above, she never provided Barron with the opportunity to provide his side of the story, or any mitigation, regarding the September 26, 2003 incident. She conducted no independent investigation of this incident, nor did she assure that Lucero's investigation included an inquiry into Barron's version of the incident. Second, she did not consider Barron's September 30 explanation of his receipt of conflicting directives from various DOLE managers regarding JobLink and other issues in the office. Barron's suggestion that the office develop a procedures manual for JobLink was an attempt to engage in problem solving with Lucero and Johnson. Third, Johnson failed to consider the letter from Barron's therapist and Barron's statement that his depression "does affect my performance, and has affected my performance." Johnson violated Board Rule R-6-6 in terminating Barron without considering mitigating information that directly affected his performance.

C. Respondent violated Board Rule R-6-5

Board Rule R-6-5 states,

> "An employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature."

The August 2003 demotion, by its own terms, covers all of Barron's performance issues, including his pattern of declining performance evaluations, up to that time. Under Rule R-6-5, Respondent is prohibited from terminating Barron for the same issues that led to his demotion.

Johnson based her decision to terminate Barron almost entirely on the same conduct for which she demoted him. One of the central reasons for discipline cited in both the demotion and termination letters is Barron's recent unsatisfactory performance ratings. While Board Rule R-6-4 authorizes an appointing authority to either demote or terminate an employee with two or more consecutive unsatisfactory performance ratings, the rule does not permit the appointing authority to impose two disciplinary actions on the basis of those same unsatisfactory performance ratings. Once disciplinary action is taken, as here, it is a violation of R-6-5 to discipline the employee again, three months later, based on the same performance history.3

In addition, both the termination and demotion letters cited Barron's violation of the terms of the September 2002 Corrective Action as a basis for imposing discipline. However, there is no evidence demonstrating that Barron violated the terms of that corrective action after his demotion. Therefore, violation of the corrective action cannot form the basis for his termination.

D. Respondent's decision was arbitrary and capricious

Johnson's termination of Barron was arbitrary and capricious. *Lawley, supra*. She neglected or refused to use reasonable diligence and care to determine whether Barron's performance following his August 2003 demotion was actually sub-standard. She failed entirely to distinguish between his pre- and post-demotion status. No reasonable appointing authority would overlook such a critical distinction and terminate an employee for the same reasons she had just demoted him three months previously.

Once Johnson learned of the events of September 26, 2003, she failed to ascertain Barron's side of the story at any point in the process. She never assured that Barron was interviewed either by Lucero's or herself, in the course of investigating that incident. She rushed to judgment by drafting the termination letter prior to the "pre-disciplinary" meeting, in violation of Board Rules R-6-10 and Rule R-6-6. This series of omissions constitute arbitrary and capricious action under *Lawley*, as Johnson failed to procure such evidence as she was required by law to consider in exercising her discretion to impose discipline. *Lawley, supra*.

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3 Barron's 2002 – 2003 annual performance review covered the period April 1, 2002 to March 31, 2003. Barron and Betty Jo Heath, the "reviewer" of the evaluation, signed it on August 28, 2003, at the time of his demotion. This performance review formed the basis for Barron's demotion. It cannot, therefore, form the basis for his termination. It is noted that on a date unknown, by a party unknown, the date on the top of the document, March 31, 2002, was changed to September 30, 2003. The change is not initialed. The fact that this document was altered does not establish a factual basis for his termination.

IV. RESPONDENT DID NOT DISCRIMINATE AGAINST BARRON ON THE BASIS OF DISABILITY

A. Barron is not disabled as defined by the Colorado Anti-Discrimination Act

Complainant argues that he was terminated on the basis of disability in violation of the Colorado Anti-Discrimination Act, section 24-34-402, C.R.S. ("the Act").

Under the Act,

> "It shall be a discriminatory or unfair employment practice: (a) For an employer . . . to discharge . . . any person otherwise qualified because of disability . . . but, with regard to a disability, it is not a discriminatory practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job." Section 24-34-402(1), C.R.S.

Disability under the Act "means a physical [or mental] impairment which substantially limits one or more of a person's major life activities and includes a record of such an impairment and being regarded as having such an impairment." Section 24-34-301(2.5)(a), C.R.S. The Act defines a covered mental impairment as "any mental or psychological disorder such as developmental disability, organic brain syndrome, mental illness, or specific learning disabilities." Section 24-34-301(2.5)(b)(III), C.R.S.

The Colorado Civil Rights Commission ("the Commission") has promulgated rules in which it interprets the Act as being "substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act," 42 U.S.C. Sections 12101 - 12117 (1994). Commission Rule 60.1, Section B, 3 Code Colo. Reg. 708-1. Therefore, interpretations of the state Act "shall follow the interpretations established in Federal regulations adopted to implement the [ADA] . . . and such interpretations shall be given weight and found to be persuasive in any administrative proceedings." *Id.*

Depression is a mental impairment under the Act. *Pack v. Kmart Corp.*, 166 F.3d 1300, 1304 (10th Cir. 1999). However, Barron has not established that his mental impairment substantially limits one or more major life activities. "A major life activity is a basic activity that the average person in the general population can perform with little or no difficulty. Major life activities include, but are not limited to, 'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'" *Id*.

Barron argues that his depression precluded him from the major life activity of working. As evidence of this he cites the fact that his depression caused his performance to decline to the point where he lost his job. However, inability to perform one particular job does not constitute a substantial limitation on working. To be regarded as substantially limited in the life activity of working, a plaintiff must show he or she is "significantly restricted in the ability to perform either a

class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. Section 1630.2(j)(3)(i); *Murphy v. United Parcel Serv., Inc*., 527 U.S. 516, 523, 119 S.Ct. 2133, 144 L.Ed.2d 484 (1999). Barron did not offer evidence of this at hearing. He has therefore not shown that his mental impairment substantially limited him in the major life activity of working.

Barron did produce some evidence that his depression caused him to have difficulty concentrating at work and sleeping. Sleeping is recognized as a major life activity under the ADA. *Pack*, 166 F.3d. at 1305. Barron's evidence on this issue, however, was scant.

In determining whether an individual is substantially limited in a major life activity, "three factors should be considered: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. Section 1630.2(j)(2)." *Pack*, 166 F.3d at 1306. To establish that he was substantially limited in the major life activity of sleeping, Barron was required to prove that he was unable to sleep or was significantly restricted as to the condition, manner, or duration of his ability to sleep as compared to the average person in the general population, taking into consideration the three factors and any mitigating or corrective measures. *Id.*

Barron did not produce evidence demonstrating that his depression would have a permanent long-term impact on his sleep. Nor did he demonstrate the expected duration of his inability to sleep. He therefore has not met his burden of proving that his depression substantially limited him in the major life activity of sleeping.

Turning to Barron's argument concerning inability to concentrate, concentration itself has been held not to be a major life activity as defined by the Act. *Pack*, 166 F.3d at 1305. In addressing this issue in *Pack*, the Tenth Circuit Court of Appeals stated, "Concentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking, but it is not an 'activity' itself." Because Barron did not prove that his inability to concentrate was integral to his ability to work <u>in general</u>, he has failed to prove he was disabled.

Because Barron was not disabled, Respondent did not have a duty to accommodate him.

V. ATTORNEY FEES AND COSTS ARE MANDATED

Barron requests an award of attorney fees and costs against Respondent. Section 24-50-125.5, C.R.S. states,

> "Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee . . . or the department, agency, board or commission taking such personnel action shall be liable for any

attorney fees and other costs incurred . . .."

Any analysis of the attorney fee issue must commence with a discussion of the unusually flagrant nature of Respondent's violation of Board Rules R-6-10 and R-6-6. Johnson was well versed in Board Rule R-6-10. In the pre-disciplinary meeting preceding her decision to demote Barron, she fully apprised him of the allegations against him, shared the source of that information, and gave him a meaningful opportunity to respond. Respondent has provided no explanation of why she failed to do so prior to terminating Barron.

Board rules mandating that the appointing authority hold a pre-disciplinary meeting and consider mitigating information *prior to* imposing discipline are not new to civil service law; to the contrary, they have comprised the procedural centerpiece of our system for decades. *Shumate* was decided twenty years ago. The rules Respondent violated here are fundamental.

To impose the most serious disciplinary action of all, termination, without providing the employee any forum in which to provide mitigation (either at the investigation stage or in an R-6-10 meeting), is inherently disrespectful of the truth, rendering Respondent's termination of Barron in bad faith. Board Rule R-8-38(A)(2). The central purpose of the pre-disciplinary meeting is to get to the heart of the truth, **prior to** depriving a classified employee of his or her property right to employment. To flagrantly bypass this process is to turn a blind eye to the truth.

Respondent's termination of Barron was also groundless. Board Rule R-8-38(A)(3) defines a groundless personnel action as one in which "it is found that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense." Where the employer has no grounds to seek an employee's dismissal, the termination is groundless and an award of attorney fees is mandated under the statute. *Coffee v. Colorado School of Mines*, 870 P.2d 608 (Colo.App. 1993). In *Coffee*, the Colorado Court of Appeals determined that while a minor form of discipline was warranted by the facts presented, no evidence supported the dramatically more serious decision to terminate the employee's employment. This case is similar. Barron did not commit most of the acts upon which discipline was based. The majority of performance issues cited for Barron's termination are identical to those cited in his demotion. The only remaining and potentially valid basis for discipline, the September 26 incident, is precluded as a matter of law. Rule R-6-10; *Shumate*. Therefore, no competent evidence remains to support the termination; it was groundless.

CONCLUSIONS OF LAW

1. Complainant committed some of the acts upon which the discipline was based;

2. Respondent's action was arbitrary, capricious, and contrary to rule and law;

3. Respondent did not discriminate against Barron on the basis of disability;

4. Complainant is entitled to an award of attorney fees and costs.

ORDER

The termination is rescinded. Respondent is to reinstate Barron to his former position as a Labor and Employment Specialist I with back pay and benefits to the date of termination. Respondent is to pay Complainant his attorney fees and costs incurred in bringing this action.

DATED this ____day of
June, 2004, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln St., Suite 1420
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is $50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment

already has been made to the Board through COFRS.
Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the____ day of **June, 2004,** I placed true copies of the foregoing **INITIAL DECISION AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Todd J. Hall, Esquire
1612 Pennsylvania Street
Denver, Colorado 80203

And in the interagency mail to:

Andrew Katarikawe
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods